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Nos. 922 and 898 Misc.

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JAMES R. BROWNING, C

# In the Supreme Court of the United States

OCTOBER TERM, 1958

MICHELE MARCHESE, PETITIONER

*v.*

UNITED STATES OF AMERICA

JESSE DEL BONO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

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### OPINION BELOW

The memorandum opinion of the court of appeals (R. VII, 3) [1] is not reported.

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[1] The record consists of seven volumes. Volumes I and VII will be referred to as "R. I" and "R. VII", respectively. Volumes II through VI, which are paginated consecutively, will be referred to as "R."

## JURISDICTION

The judgment of the court of appeals was entered on April 15, 1959. The petition for a writ of certiorari in No. 922 was filed on May 14, 1959. The petition for a writ of certiorari in No. 898 Misc. was filed on May 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether evidence of an informer's telephone conversations, making arrangements for narcotics transactions, was admissible even though 18 U.S.C. 1403 makes it a crime to use a communication facility in violation of statutes prohibiting the sale of narcotics.

2. Whether evidence of such telephone conversations was admissible, when obtained by officers through listening over the telephone receiver being used by the informer with the informer's permission.

3. Whether entrapment was established as a matter of law.

4. Whether this Court's decision in *On Lee* v. *United States*, 343 U.S. 747, should be reconsidered.

5. Whether the evidence was sufficient to support the conviction.

## STATUTE INVOLVED

18 U.S.C. 1403 provides:

Use of communications facilities—penalties.

(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

(1) subsection (a) or (b) of section 7237 of the Internal Revenue Code of 1954,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C. sec. 184a),

shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

(b) For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication.

STATEMENT

On April 16, 1958, in the United States District Court for the Southern District of California an eleven-count indictment was returned against petitioners charging them with conspiracy to violate the narcotic laws and with three illegal sales of heroin (18 U.S.C. 371, 21 U.S.C. 174, 26 U.S.C. 4705(a), 7237) (R. I, 1-8). Petitioner Marchese was found guilty on the first ten counts (conspiracy and counts involving sales on January 30, February 7, and March 13, 1958) and petitioner Del Bono was found guilty on counts 1, 8, 9, and 10 (conspiracy and three counts involving a sale on March 13, 1958) (R. I, 35-36).[2] Both petitioners were

[2] Upon motion of the government, count 11 was dismissed (see R. I, 21).

sentenced to concurrent terms of ten years' imprisonment (R. I, 47-50; R. 776, 779). On appeal, the convictions were affirmed (R. VII, 3).

The evidence for the government showed that Donald Sussman, a narcotics user, had been selling heroin on consignment for petitioner Marchese for over four years (R. 417, 473-474, 490). On January 30, 1958, Sussman, acting as a government informer (he had been arrested), met with federal and state agents at a parking lot in Los Angeles (R. 18-20, 95, 434). After the officers had searched Sussman's person and automobile, and found no narcotics, they placed a radio transmitter on his body (R. 20, 126, 225). Sussman, with the officers following, went to the apartment of Miss Helen Nichols, where Marchese also lived, in Moorpark, North Hollywood (R. 7, 22, 108-109, 126-127, 225, 246, 365-366, 415-416, 424). Outside the apartment the officers observed a white Chrysler Imperial automobile, license number MLH 304, the use of which had been given to Marchese by his father, the registered owner of the car (R. 33, 122-125, 128, 246-247). Two officers listened on earphones as Sussman conversed with Marchese at the Moorpark address (R. 23, 30). Sussman told Marchese that he knew a person who wanted "to pick up some merchandise" (R. 31). Marchese replied, "Well, O.K. The stuff will be at the same place, which is 3rd and Normandie" and the two agreed that Sussman would pick up the merchandise that afternoon sometime after 2:30 (R. 31-32, 366-371, 499, 506-508). At approximately 1:55 that afternoon, Sussman, in the presence of a federal narcotics agent, telephoned petitioner and was again told not to pick up the merchandise before 2:30 (R. 33-36, 371-372). Sussman then drove, followed by the officers,

to 3rd and Normandie and entered the rest room of a gas station located there (R. 37, 373). He found no narcotics and left (R. 37-38, 373). About a half hour later, Sussman again entered the rest room, but found no narcotics (R. 38, 373). Officers searched the rest room after each user left (R. 38, 129, 232-234). Shortly thereafter, petitioner Del Bono entered the rest room and left after a few minutes (R. 130, 233). The officers then searched the rest room and found a package of heroin under the wash basin (R. 38-40, 120-121, 131-135, 233-236). Sussman, with an officer listening, telephoned Marchese who told him that he could pa in the morning (R. 41-42, 374-375). The next day, January 31, 1958, Sussman was given $1000 with which to pay Marchese and, with the radio transmitter strapped to himself, he entered the Moorpark apartment outside of which Marchese's Chrysler Imperial was parked (R. 42-43, 138-139, 381-382, 508-509). There, with officers listening to the conversation over earphones, Sussman paid Marchese $1000, $110 of which Marchese gave back to him (R. 43-45, 381-383, 508-511).

On February 7, 1958, Sussman, with officers again listening to the radio transmitter, met petitioner Marchese at the Moorpark apartment and discussed another $1000 purchase and a possible $15,000 purchase (R. 48-50, 383-387, 511-513). As to the $1000 purchase, Marchese said that the heroin would be left at a different gas station at about 1:00 p.m. (R. 49, 335-336, 386, 512-513). Officers searched the rest room of this gas station but found no narcotics until after petitioner Del Bono had entered and left (R. 165-167, 195-196, 237-238, 251-252). Sussman telephoned Marchese who told him to bring the money to the Moor-

park apartment (R. 387). That evening at the apartment Sussman gave Marchese $1000 and Marchese returned $20 to him (R. 53-54, 253-254, 389).

On March 12, 1958, Sussman twice telephoned Marchese and told him that, Sussman, would come over to the Moorpark apartment (R. 55-56). Early that afternoon Sussman went to the apartment, stayed for forty minutes and left (R. 57, 254). At 4:15 that afternoon a man who had come from the International Airport entered petitioner Del Bono's house carrying several bags (R. 338-339, 350-351).[3] A few hours later Del Bono entered the Moorpark apartment where petitioner Marchese's Chrysler Imperial was parked (R. 339, 353-354). About 9:00 p.m., Sussman entered the Moorpark apartment, stayed until 10:55 and then left (R. 58, 254-255). The next morning at the Moorpark apartment Marchese told Sussman that "the merchandise was here" and that Sussman could purchase $11,500 worth of narcotics (R. 58-59, 390). Sussman asked if the package could be left at a closer place (R. 390-391). When Sussman met Marchese at Vineland and Ventura Boulevards at noon, Marchese told Sussman that he would "make the telephone call for the merchandise to be delivered" and that it would be found in the trunk of a 1941 Dodge parked in that vicinity at about 12:30 p.m. (R. 60-61, 140, 143, 200, 255, 318-319, 355-356, 393-395). In the middle of his conversation with Sussman, Marchese made a telephone call (R. 200, 255, 318-319, 355-356, 395). At 12:15 p.m., Del Bono left his house carrying a brown paper

[3] This man was observed by Narcotic Agent Daley who had been informed that a shipment of narcotics was coming from New York (R. 344).

bag which he placed in the trunk of a 1941 Dodge and drove to Vineland and Ventura (R. 168-169, 301-303, 306-307). Del Bono parked the car there and got into a 1957 Buick driven by Marchese (R. 61, 77-78, 169, 176-177, 256, 307-308). Sussman took from the trunk of the 1941 Dodge a brown paper bag containing two pounds of heroin (R. 61, 77-78, 121, 393-396).

ARGUMENT

1. Petitioners contend that the evidence of Sussman's telephone conversations with petitioner Marchese should not have been admitted because it was obtained in violation of 18 U.S.C. 1403 (which prohibits the use of the telephone in connection with a violation of certain narcotics laws (see *supra*, pp. 2-3)) and of 47 U.S.C. 605 (which forbids interception and publication of telephone conversations) (No. 922, Pet. 16-18, 24; No. 898 Misc., Pet. 14-17, 22-23). Petitioners, however, are raising these objections for the first time in this Court. Marchese's counsel objected to the testimony of Officer Richards concerning these conversations only because no foundation was laid showing that the witness was "familiar with the telephone voice of the defendant Marchese" (R. 35-36). Del Bono's counsel merely joined in this objection (R. 36). No objection was made by either petitioner to the testimony of Sussman concerning these same conversations (see R. 371-372, 374-375, 387). Petitioners can not now be permitted to raise new objections to the introduction of evidence that could have been presented to the trial court. See, *e.g.*, *Paschen* v. *United States*, 70 F. 2d 491, 501 (C.A. 7); *Mansfield* v. *United States*, 76 F. 2d 224, 232-233 (C.A. 8), certiorari denied, 296 U.S. 601. See

also *District of Columbia* v. *Woodbury*, 136 U.S. 450, 462.

In any event, the fact that the officers engaged in conduct which, when done for a criminal purpose, is proscribed by 18 U.S.C. 1403, does not make their conduct illegal under the present circumstances. The statute forbids the use of the telephone only to one engaged in a violation of the narcotics laws. Here there was no violation of the narcotics laws by either Sussman or the officers, since they acted in furtherance of their official duty and, in doing so, had not the *mens rea* necessary for criminality. Similarly, there was no violation of 47 U.S.C. 605. In *Rathbun* v. *United States*, 355 U.S. 107, this Court held that overhearing a telephone conversation by means of an extension phone with the permission of one of the conversing parties did not violate 47 U.S.C. 605. In reaching this conclusion, the Court found that the statute would not have been violated had the conversing party "held out his handset so that another could hear out of it" and then equated such action with use of an extension phone. *Id.* at 110-111. It is thus clear that Officer Richards did not violate 47 U.S.C. 605 when he directly overheard the conversation by placing his ear next to the receiver with the permission of Sussman, the party who placed the calls (R. 35, 41, 55, 372).

2. Petitioners contend that their convictions should be set aside on the ground that entrapment was established as a matter of law (No. 922, Pet. 18-21; No. 898 Misc., Pet. 17-20). Petitioners, however, failed to raise this issue until they submitted a supplemental brief in the Court of Appeals. Since entrapment is a factual issue and since the government was not given the opportunity to rebut the allegations first made

after the trial was over, petitioners should not be allowed to raise this contention in this Court. See *Giordenello* v. *United States*, 357 U.S. 480, 488.

Even as the record now stands, the evidence clearly shows that the officers merely provided an opportunity for petitioners to carry out their preconceived criminal intentions. Sussman had been selling narcotics for Marchese for over four years (*supra*, p. 4). On January 30, 1958, when Sussman told petitioner Marchese that he wanted to buy some narcotics, Marchese immediately and voluntarily agreed, and arranged for the delivery by petitioner Del Bono (*supra*, pp. 4-5). The government agents never even dealt with Del Bono. As this Court has recognized on several occasions, "stealth and strategy are necessary weapons" in the revelation of criminal enterprises, and "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment" as long as the criminal design does not originate in the mind of the government official. *Sherman* v. *United States*, 356 U.S. 369, 372; see *Sorrells* v. *United States*, 287 U.S. 435; *Masciale* v. *United States*, 356 U.S. 386.

3. Arguing that the use of a radio transmitter was "dirty business," petitioners urge this Court to reexamine its decision in *On Lee* v. *United States*, 343 U.S. 747 (No. 922, Pet. 21-24; No. 898 Misc., Pet. 20-23). There, the Court held that the admission of evidence obtained through the use of a radio transmitter, under circumstances similar to those in the instant case, does not violate either a defendant's constitutional rights or Section 605 of the Communications Act. Petitioners set forth no considerations not presented and rejected by the Court in that case.

4. Petitioners allege that the testimony of Sussman is that of an accomplice and is not sufficiently corroborated to support the convictions (No. 922, Pet. 25-29; No. 898 Misc., Pet. 23-26). Sussman, however, was not an accomplice to the crimes charged in the instant case, since he was a government informer at the time these crimes were committed. Even if Sussman's testimony were considered as that of an accomplice, this Court has held that there is no absolute rule that a conviction may not rest upon the uncorroborated testimony of an accomplice. *Caminetti* v. *United States*, 242 U.S. 470, 495. Moreover, there was more than ample corroboration of Sussman's testimony. Not only was his every step observed by numerous officers, but his conversations with petitioner Marchese arranging for the sales and making the payoffs were overheard. In view of the testimony concerning these arrangements corroborating Sussman's detailed account of the narcotics transactions, the evidence was clearly sufficient to support the convictions.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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